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No. 96-1252

(2)

In The

Supreme Court of the United States

October Term, 1996

PROFESSIONAL MEDICAL INSURANCE COMPANY; PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION,

Petitioners,

vs.

G. THOMAS MURFF,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* TRANSIT CASUALTY COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF PROFESSIONAL MEDICAL INSURANCE COMPANY AND PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Transit Casualty Company (Transit) moves the Court to enter its order granting Transit leave to file an *amicus curiae* brief in support of the petition for writ of certiorari of Professional Medical Insurance Company and Professional Medical Risk Retention Group, in Liquidation (ProMed) filed with the United States Supreme Court on February 10, 1997.

Consent for leave to file an *amicus curiae* brief has been sought from all parties. Petitioner ProMed has, by and through its counsel, consented. Respondent G. Thomas Murff (Murff) has denied consent.

Transit, as movant, has a significant interest in the outcome of this case. Transit was incorporated under the laws of the State of Missouri in 1945 and was authorized to issue policies in all fifty states. On December 3, 1985, the Circuit Court of Cole County, Missouri (State Court) declared Transit insolvent pursuant to Mo. Rev. Stat. § 375.660 (Vernon 1985) and the Amended Liquidation Order issued on that date.

Transit is the largest property and casualty insurance insolvency in United States history. It is also the largest and controlling creditor of the largest insurance insolvency in British history. Since the Transit liquidation is governed by the Missouri insurance insolvency code, the decision of the Eighth Circuit will have a significant effect on the future conduct of the Transit liquidation. Given Transit's status in the United States and overseas insurance markets, the Eighth Circuit's decision could affect the entire insurance insolvency arena to the detriment of

United States policyholders, by allowing reinsurers to escape their obligations to insolvent insurers.

Transit's special deputy receiver and his staff are engaged in two principal activities: (1) the review, allowance and payment of claims submitted by policyholders and third-party claimants, and (2) the collection of reinsurance monies due Transit relating to those claims from some 900 reinsurers located in the United States and in thirty foreign countries.

Transit insured many policyholders that have long-tail claims involving asbestos bodily injury and property damage, medical device implants (heart valves and breast implants), HIV infected blood products, environmental sites and so on. Transit issued this long-tail coverage from 1978 to 1985. Many of the claims have taken over a decade to develop.

By State Court order, Transit sent out over 300,000 proofs of claim (POCs) forms to insureds, claimants, reinsurers, agents or attorneys for insureds, brokers, finance companies (on return of premium), state guaranty funds, ancillary receivers, attorneys for third-party claimants, general creditors, vendors and government tax authorities. Transit has received approximately 200,000 notices of claim or POCs from these various parties.

Reinsurance recoveries are the principal asset of the Transit estate. To date, Transit has marshalled over $700 million in assets. Transit's collection efforts increase the funds available to pay claims of policyholders and third-party claimants. Thus, asset collection is one of the most important aspects of the liquidation process. Transit has settled with approximately 350 reinsurers, but still has

outstanding claims against approximately 400 to 450 reinsurers.

Transit also has an appeal pending before the Eighth Circuit in *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, No. 96-2532 (*Lloyd's*), in which the Eighth Circuit will again be considering the three-part test articulated by this Court in *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993) (*Fabe*). Among other things, the Eighth Circuit has been asked to determine whether the McCarran-Ferguson Act saves the anti-arbitration provision of Mo. Rev. Stat. § 375.1188(1) (Vernon 1991) from preemption by the federal statutes implementing the Convention on Recognition and Enforcement of Foreign Arbitral Awards (Convention), June 10, 1958, 21 UST 2517, TIAS No. 6997.

Transit was not a party to the suit instituted in the United States District Court for the Western District of Missouri, entitled *Murff v. Professional Medical Ins. Co., et al.*, No. 94-0164-CV-W-8 (*Murff*), that gives rise to the order which Petitioner ProMed now seeks to have reviewed by the Supreme Court on the petition for writ of certiorari.

Transit agrees, however, that the Eighth Circuit in requiring "substantial impairment" of the liquidator's ability to liquidate the insurer has applied a test not applied in the other circuit courts. In *Murff*, the Eighth Circuit interpreted the same statute at issue in the *Lloyd's* litigation – Mo. Rev. Stat. § 375.1188(1) (Vernon 1991).

Thus, the Eighth Circuit's decision could have a significant effect on how other provisions of the same statute are interpreted.

Transit believes that ProMed's petition for writ of certiorari presents an important and substantial question of federal law which has not been settled by this Court: What is the appropriate test for determining whether a federal statute impairs, invalidates, or supersedes a state law regulating the business of insurance within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1996)? This issue is deserving of the time and resources necessary for this Court to decide the case. The *Murff* decision is of substantial importance to the state insurance insolvency receivers and appointed special deputy receivers who are charged under the laws of the fifty states with the supervision, rehabilitation and liquidation of insolvent insurance companies. Any decision in this case would substantially affect insurance insolvency proceedings, the number of which has been significant in the last twenty years. A.M. Best, an insurance company rating service, reported that 372 property-casualty insurers became insolvent in the United States between 1969 and 1990. *See* A.M. Best, *Best's Insolvency Study: Property/Casualty Insurers, 1969-1990* 1-2 (June 1991). In addition, many insurance insolvencies have occurred overseas that directly affect the insolvencies in the United States.

The *Murff* decision further expands the division among the circuit courts that have attempted to apply the third part of the three-part test articulated in *Fabe*. Thus, similarly situated insurance insolvencies subject to similar state regulatory schemes are being treated differently

as a result of this conflict to the detriment of policyholders and other creditors of insolvent insurers.

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QUESTIONS PRESENTED

1. Does the McCarran-Ferguson Act permit a federal statute, not specifically relating to the business of insurance, to "invalidate, impair, or supersede" a state statute regulating the business of insurance so long as the negation of the state statute does not "substantially impair" the entire state regulatory scheme, as held by the Eighth Circuit in a decision which exacerbates the clear conflict already existing between the decisions of the First, Fourth, Sixth, Seventh, and Ninth Circuits, with respect to a question which remains unsettled by this Court?

2. Does the McCarran-Ferguson Act permit the federal court to hear Respondent's federal age discrimination claims against Petitioner insolvent insurers, divesting the receivership court of its exclusive jurisdiction over all claims involving the insolvents, and overriding the receivership court's order to stay all litigation against the insolvents, pursuant to Missouri's comprehensive scheme for the regulation of the business of insurance?

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BRIEF OF *AMICUS CURIAE*

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-10) is reported as *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996). The order of the Court of Appeals denying ProMed's petition for rehearing is unreported (Pet. App. 23). The decision of the United States District Court for the Western District of Missouri dismissing respondent Murff's claim is also unreported (Pet. App. 11-22).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND STATE STATUTES INVOLVED

The relevant section of the McCarran-Ferguson Act (1945), codified at 15 U.S.C. § 1012(b) (1996), provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

The stay provision of Missouri's Insurers Supervision, Rehabilitation and Liquidation Act, codified at Mo. Rev. Stat. § 375.1188(1) (Vernon 1991), provides:

> Upon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this state, no action at law or equity or in arbitration shall be brought against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing actions be maintained or further presented after issuance of such order.

The jurisdictional provision of Missouri's Insurers Supervision, Rehabilitation and Liquidation Act, codified at Mo. Rev. Stat. § 375.1154(6) (Vernon 1991), provides:

> All actions herein authorized shall be brought in the circuit court of Cole County or any other county where the principal office of the insurer is or was last located, and venue of all proceedings and cases ancillary or related to such actions shall be proper in said court.

The jurisdictional provision of the Age Discrimination in Employment Act of 1967, codified at 29 U.S.C. § 626(c)(1) (1996), provides:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter. . . .

SUMMARY OF ARGUMENT

Missouri has a comprehensive, self-contained and exclusive insurance insolvency code. It sets forth the substantive law and procedures to be followed in insurance insolvencies. The intent of Mo. Rev. Stat. § 375.1188(1) (Vernon 1991) of the code is to consolidate actions against an insolvent insurer in the receivership court, especially when the claims are for assets of the estate.

In *Murff*, the Eighth Circuit found that § 375.1188(1) (Vernon 1991) was not saved from pre-emption under the McCarran-Ferguson Act by 29 U.S.C. § 626(c)(1) (1996). The federal statute permits suit in any court of competent

jurisdiction. The Eighth Circuit found that the third part of the *Fabe* three-part test was not satisfied because the federal statute did not "substantially impair[ ]" the "receiver's ability to effect [the insurer's] liquidation." This requirement is not found in the McCarran-Ferguson Act, the decisions of this Court or the decisions of the other circuit courts. The focus, instead, should be on whether the state law itself is invalidated, impaired or superseded by the federal law.

ARGUMENT

Missouri has had a comprehensive insurance insolvency code since at least 1909. *See* Mo. Rev. Stat. §§ 7076 to 7097 (1909).[1] In *William Blair Realty Partners, III v. Transit Casualty Co.*, 900 S.W.2d 671, 675-676 (Mo. App. 1995), a unanimous panel of the Missouri Court of Appeals recently confirmed that the Missouri insurance insolvency code is "a self-contained and exclusive statutory scheme." The appellate court held: "The statutory provisions of the Missouri insolvency law govern the administration of the assets of an insolvent insurer, and

[1] This code was substantially revised in 1939 (§§ 5812 and 6048 to 6070, RSMo 1939). In 1991, 1992 and 1996, the provisions were again substantially amended. *See* H.B.No. 385, 86th Leg., 1st Sess., 1991 Missouri Laws; H.B. No. 1574, 86th Leg., 2nd Sess., 1992 Missouri Laws; and S.B. 896, 88th Leg., 2nd Sess., 1996 Missouri Laws.

the trial court must administer the insolvent estate in accordance with these statutory provisions." *Id.* The insurance insolvency statutes "prevail over any general statutes or common law because the legislature has set forth the substantive law and procedures to be followed." *Id.* at 676. *See also State ex rel. ISC Fin. Corp. v. Kinder*, 684 S.W.2d 910, 913 (Mo. App. 1985); *Medallion Ins. Co. v. Wartenbee*, 568 S.W.2d 599, 601 (Mo. App. 1978); *O'Malley v. Prudential Casualty & Sur. Co.*, 80 S.W.2d 896, 897 (Mo. App. 1935).

Mo. Rev. Stat. § 375.1188(1) (Vernon 1991) of the Missouri Insurers Supervision, Rehabilitation and Liquidation Act prohibits any "action at law or equity or in arbitration against the insurer or liquidator. . . . " once an order issues appointing a liquidator for the insurer. The intent of this statute is to consolidate actions in the state receivership court in order to efficiently, economically and equitably resolve claims against the assets of the insolvent's estate. *See, e.g., Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249, 254 (5th Cir. 1990) (reinsurance proceeds are assets of Transit which must be claimed in the Missouri liquidation court) (applying Missouri law).

In *Fabe*, this Court developed a three-part test for analyzing the reverse preemption rule found in the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1996). Under this three-part test, the federal law will control only if the following are true: (1) the federal statute "specifically relate[s]" to the business of insurance, or (2) the state law was not "enacted for the purpose of regulating the business of insurance," or (3) the state law was enacted for that purpose, but the federal law does not

"invalidate, impair or supersede" the state law. *Fabe*, 508 U.S. at 501.

In interpreting the third-part of the *Fabe* three-part test, the Eighth Circuit required a "substantial impairment" of the "receiver's ability to effect [the insurer's] liquidation under the Insolvency Act" in order for the federal statute to "run afoul of the proscriptions of the McCarran-Ferguson Act." *Murff*, 97 F.3d at 292. This requirement does not appear in the McCarran-Ferguson Act, which requires only that the federal law "invalidate, impair, or supersede any law enacted by any state." Nor is the "substantial impairment" requirement found in this Court's decisions interpreting the McCarran-Ferguson Act. The "substantial impairment" requirement also goes far beyond the other circuits' formulation of the third-part of the *Fabe* test. *See, e.g., Villafane-Nerziz v. Fed. Deposit Ins. Corp.*, 75 F.3d 727, 735-736 (1st Cir. 1995); *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45-46 (2d Cir. 1995); *Kenty v. Bank of Columbus*, 92 F.3d 384, 392-393 (6th Cir. 1996); *N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 296-297 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.), *cert. denied*, 116 S.Ct. 418 (1995).

Moreover, under this articulation of the third part of the *Fabe* three-part test, resolution of the preemption issue may depend on the individual nature, complexity and size of each insurance insolvency. The Eighth Circuit's test focuses on the liquidator's ability to liquidate the insurer despite the operation of the federal law, rather than considering whether the state law itself is invalidated, impaired or superseded by the federal law.

In *Transit Casualty Co. v. Certain Underwriters at Lloyds of London*, No. 96-2532, Transit filed suit against Lloyds in the Missouri liquidation court for reinsurance recoverables. Lloyds removed the case to the United States District Court for the Western District of Missouri, and there sought to compel arbitration pursuant to the Convention On the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208 (1996).

In a decision predating the Eighth Circuit's decision in *Murff*, the District Court found that requiring Transit's Receiver to arbitrate his disputes with Lloyd's would "impair, invalidate and supersede" Missouri statutes expressly prohibiting the enforcement of agreements to arbitrate against receivers of insolvent insurers. *Transit Casualty Co. v. Certain Underwriters at Lloyds of London*, No. 96-2532, slip op. at 5 (W.D. Mo. June 10, 1996). Lloyd's appeal is pending.

The intervening *Murff* decision, issued in October 1996, threatens this result because it holds that the divesture of the jurisdiction of the Missouri liquidation court over claims by and against the insolvent Transit does not "substantially impair the receiver's ability to effect [Transit's] liquidation under the Insolvency Act." *Murff*, 97 F.3d at 292. A prompt determination of the issues presented by ProMed's Petition would clarify the third prong of the *Fabe* test, resolve the issues presented by Lloyd's appeal, and benefit the Transit estate, which still has outstanding claims against approximately 350 to 400 reinsurers across the nation and worldwide.

Estates with numerous claimants such as ProMed and Transit could expend considerable estate assets if forced to prosecute litigation with creditors and claimants in a multitude of states and foreign countries. This far-flung litigation again raises the prospect of conflicting interpretations of the Missouri insurance insolvency code, considerable expense to the estate, a wasting of estate assets otherwise payable to policyholders and third-party claimants, inequitable treatment of claimants, and the payment of preferential offset payments to reinsurers that are inconsistent with the distribution statute.

CONCLUSION

It is respectfully submitted that the decision of the Eighth Circuit Court of Appeals was incorrect in several respects, most of which are more fully addressed in the petition for writ of certiorari submitted by ProMed. The United States Supreme Court should grant certiorari and resolve the conflict in the circuits on this extremely important issue affecting the insurance industry as a whole and insolvent insurers specifically. The decision of the Eighth Circuit Court of Appeals has a far-reaching,

negative impact on insolvents' policyholders, who, after all, are the most deserving parties of all.

Respectfully submitted,

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